SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1928.

NO. 166.

THE STATE OF ALABAMA AND ALABAMA PUBLIC SERVICE COMMISSION,
Appellants,

vs.

THE UNITED STATES OF AMERICA, ATLANTIC COAST LINE RAILROAD COMPANY, SEABOARD AIR LINE RAILWAY COMPANY, ET AL.

BRIEF FOR APPELLANTS ON APPEAL

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December, 1928.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1928

NO. 166.

STATE OF ALABAMA, ET AL.,

vs.

UNITED STATES, ET AL.

BRIEF FOR APPELLANTS ON APPEAL.

GENERAL STATEMENT OF CASE SHOWING JURISDICTION.

Appellants, the State of Alabama and the Alabama Public Service Commission, brought this action in the United States District Court for the Northern District of Alabama, Southern Division, at Birmingham, seeking to enjoin and annul an order of the Interstate Commerce Commission.

This Court has jurisdiction of this appeal under Sections 47 and 345, Title 28, U. S. Code.

The order appealed from in this cause was entered on February 13, 1928, by a statutory court composed of three judges (R. 236 to 238); within 30 days, and on the 8th day of March, 1928, petition for appeal was presented and allowed (R. 238-239).

The suit in which the judgment was rendered, from which an appeal was taken, as hereinbefore stated, was brought to set aside orders of the Interstate Commerce Commission and to enjoin the railroad defendants from seeking to file and make effective tariffs in accordance with such orders. The United States was made a party defendant as

were the railroads interested (R. 1 and 2). The complaint sets out in full reasons why appellants claim that they were entitled to the injunction prayed (R. 1 to 18, inclusive). The United States answered (R. 27), and the Interstate Commerce Commission intervened as a defendant (R. 147). Three judges, two circuit judges and one district judge, heard the case and without writing any opinion denied an injunction (R. 236). In accordance with Section 47 of Title 28, U. S. Code, and within thirty days, an appeal was taken direct to this Court from such order denying, after notice and hearing, the interlocutory injunction prayed.

This Court has taken jurisdiction in similar cases. Typical of these are, *Louisville & Nashville R. Company v. United States*, 238 U. S. 1; *Railroad Commission of Wisconsin v. Chicago, B. & Q. R. Company*, 257 U. S. 563; *Akron, C. & Y. R. Co. v. United States*, 261 U. S. 184, 189; *Virginian R. Co. v. United States*, 272 U. S. 658.

RECORD ON APPEAL.

All the testimony before the Interstate Commerce Commission on which it based its right to issue the order sought to be enjoined and set aside was introduced before the trial judges (R. 1030). On appeal as required by Equity Rule 75 appellants "stated in simple and condensed form" the parts of such testimony deemed "essential to the decision of the questions presented by the appeal." Appellees not agreeing that the testimony should be condensed presented all the testimony in narrative form and all the testimony before the Commission and the trial court except a few designated exhibits, is brought here by order of the trial court (R. 1031, 1033).

After the appeal reached this Court and in a further effort to reduce the record to be printed to its essential parts and complying with paragraph 9 of Rule 11 of this Court,

appellants stated the points on which they intend to rely and the parts of the record necessary to be printed (R. 1038-1043). Appellees replying designated all the testimony (R. 1043-1046). If, as we believe, the record is unnecessarily large, the fault lies with appellees.

STATEMENT OF THE CASE SHOWING QUESTIONS PRESENTED AND HOW THEY AROSE.

I. ORDERS OF THE COMMISSION SOUGHT TO BE ENJOINED.

In this proceeding appellants sought to suspend and set aside an order of the Interstate Commerce Commission entered October 3, 1927, and other orders, including that of December 22, 1927, entered supplementary thereto, in so far as such orders relate to intrastate commerce within the State of Alabama.

These orders were made upon the petition of the defendants, the standard lines of railroads. The Public Service Commission, one of the plaintiffs below, was a party to the proceedings under which such orders were made and participated therein (R. 1, 2).

The petition in this cause shows that effective July 25, 1924, in accordance with an order of the Alabama Public Service Commission, intrastate rates in Alabama on fertilizers and fertilizer materials were published by all the carriers defendant hereto; that some of such rates were lower per mile than some of the interstate rates on the same commodities; and that on July 30, 1924, the carriers, defendants in the original bill, filed a petition, called hereinafter Docket 16336, in the Interstate Commerce Commission as authorized by Section 13 of the Acts to Regulate Commerce, "on their own behalf and on behalf of all of the carriers operating in the State of Alabama," in which it was alleged that the rates effective July 25, 1924, prescribed by the Alabama Public Service Commission in its order of May 26, 1924—

> "are unjustly discriminatory against interstate commerce and place an undue burden upon interstate commerce in violation of Section 3 and Sub-divisions 3 and 4 of Sec-

tion 13 of the Interstate Commerce Act as amended by Section 416 of the Transportation Act of 1920." (See paragraph 6 of original petition herein, R. 4.)

On October 14, 1924, the Interstate Commerce Commission in Docket 16336 (see Exhibit 5 of answer of standard line defendants, R. 206-207) ordered:

"(2) That all railroads subject to our jurisdiction operating within said State of Alabama be and they are hereby made respondents to this proceeding."

These short line railroads were also respondents to a general investigation, hereinafter referred to, which related solely to interstate rates and which was ordered by the Interstate Commerce Commission on October 14, 1924. (See Paragraph 7 of plaintiff's petition, R. 5.)

The order of general investigation was numbered on the docket of the Interstate Commerce Commission as 16295 and was entitled, "Fertilizers and Fertilizer Materials Between Southern Points," and that investigation is described by the Interstate Commerce Commission in its findings, 113 I. C. C. 392, as follows:

"A general investigation and inquiry—into and concerning said interstate rates on fertilizers, fertilizing compounds, and fertilizer materials and the charges resulting therefrom, . . . with a view to determining whether said rates and charges are unreasonable or are unduly prejudicial to or unduly preferential of particular localities or persons and to making such order or orders as may be proper in the premises." (R. 36, 37.)

When that investigation was before the Interstate Commerce Commission it was heard with Docket 16335, involving intrastate rates in South Carolina; Docket No. 16336, which is the docket referred to as being the complaint filed by the

interested carriers on July 30, 1924; and Docket No. 16484, pertaining to intrastate rates in Georgia.

The Commission having heard all four of these dockets together, all the testimony taken in such hearings was presented to the trial court as evidence, although much the greater portion of the record relates to matters other than the intrastate rates in Alabama.

The consolidated hearings seem to have been conducted on the theory that the Alabama case was merely a relatively unimportant incident of the general investigation.

Attached to the complaint as amended is a full copy of the order of October 3, 1927 (R. 24-25), the supplemental order of December 22, 1927 (R. 224), and a copy of all that part of the findings and opinion of the Interstate Commerce Commission which we believe is in anywise material to the issue. The full opinion of the Commission is reported in 113 I. C. C. beginning at page 389, but as most of this opinion relates to the interstate rates, only a small part of it is material to any issue in this case (R. 33 *seq.*).

The supplemental order of the Commission made December 22, 1927, subsequent to the filing of the petition in this case, extended the scope of the order of October 3, 1927, by including short line roads wholly within the State of Alabama. By amendment these short lines were made parties defendant (R. 220). After the order of October 3, 1927, some of these short line railroads, possibly all of them, petitioned the Commission asking that the order be extended to them (R. 225). This petition was served but no further hearing was had thereon.

The rates intrastate in Alabama, as generally in the South, are not the same on short line railroads as on the trunk line roads. The claimed reason for this is that some of the short line railroads, not all, would earn less than a fair return

were they limited to the same rates as the trunk lines, and both the Alabama Public Service Commission and the Interstate Commerce Commission have permitted these short lines higher than standard rates (R. 65, 66, 84).

The Interstate Commerce Commission made a broad conclusion as follows:

> "1. That the maintenance of intrastate rates in Alabama on a lower basis than the corresponding rates herein found reasonable for the interstate transportation of fertilizers and fertilizer materials will for the future result in unjust discrimination against interstate commerce and in undue prejudice to persons and localities in interstate commerce."

The proof, if any, of a violation of Section 3, relates to certain border competition along the boundaries of the State of Alabama; there is no pleadings or evidence covering all the intrastate rates in Alabama on fertilizers; the Commission adopted a single scale when all evidence was directed to two scales and no one asked for a single scale. On this point (R. 80) the Commission said:

> "Carriers and shippers both acquiesced in the idea that the rates should be somewhat higher for joint-line than for single-line hauls. The carriers would maintain such a difference for all hauls, while the shippers would have it disappear at 500 miles."

And further discussing this point (R. 81) the Commission said:

> "Manifestly where no additions are allowed for joint-line service and where short-line distances are used as the single scale should be correspondingly increased. As above noted, of the total fertilizer traffic covered by the traffic test, single-line rates were applied to 67 per cent. Joint-line arbitraries were therefore applied to

only about one-third. It is also true that where joint-line arbitraries are used the carriers in many instances do not secure the full amount of the arbitrary nominally applicable for any given distance, for often slightly longer single-line routes will determine the applicable rates. Under the circumstances the elimination of joint-line arbitraries will require a comparatively small increase in the single-line scale."

II. THE GROUNDS UPON WHICH THE CLAIM OF INVALIDITY OF THE ORDER WAS BASED.

Paragraph 27 of the complaint as amended shows the reasons why appellants think the order of the Interstate Commerce Commission is void. (See original complaint, R. 13 *seq.* amended complaint R. 223, 224.) The assignment of errors (R. 241 *seq.*) has been summarized in the statement of "Points On Which Appellants Intend to Rely," which summary is:

Point 1. The District Court, three judges presiding, of the Northern District of Alabama, Southern Division, at Birmingham, erred in not enjoining the order of the Interstate Commerce Commission for that said order was beyond the power which the Interstate Commerce Commission could constitutionally exercise, such order regulated intrastate commerce not shown to affect or burden commerce among the States.

Point 2. The court erred in not enjoining the order for that such order was entered in violation of the Due Process Clause of the Fifth Amendment to the Constitution of the United States in particulars as follows:

(a) There was no issue or testimony before said Commission or before said court relating to the relationship of the rates on transportation wholly within the State of Ala-

bama and the rates prescribed by said order to take the place of such intrastate rates.

(b) There was no issue raised justifying and no evidence to support the rates established by said order and made applicable thereby both to single and to joint line hauls wholly within the State of Alabama, both the issues and the evidence referred exclusively to rates for single lines lower than and different from the rates over two or more lines.

Point 3. The court erred in not enjoining the order for that such order was beyond the statutory power of the Interstate Commerce Commission in so far as it sought to regulate intrastate commerce and controlled rates charged for the transportation of property wholly within the State of Alabama.

Point 4. The court erred in not enjoining said order as the Interstate Commerce Commission in entering the order acted arbitrarily and unjustly, and prescribed rates for the transportation of property wholly within the State of Alabama contrary to all the evidence and without any evidence to support its action in particulars as follows:

(a) The issue raised and heard was whether or not the rates on the transportation of property wholly within the State of Alabama in their relation to the rates on interstate transportation violated Section 3 of the Interstate Commerce Act as amended by Transportation Act 1920 and as to many of the rates on transportation wholly within the State of Alabama there was no evidence of any such violation.

(b) There was no issue raised by the pleadings of the parties or order of the Interstate Commerce Commission between the rates on the transportation of property wholly within the State of Alabama and the rates found reasonable on interstate transportation and ordered applied intrastate in Alabama.

(c) There was no evidence to support a finding that all the rates on transportation wholly within the State of Alabama were in competition with interstate transportation.

(d) The order in so far as it applies on interstate transportation prescribes only maximum rates, while as applied on intrastate transportation in the State of Alabama it prescribes rates that are both maximum and minimum rates.

(e) Import rates on fertilizer materials are a part of the transportation charge and these rates were left on a group basis while domestic rates intrastate in Alabama were placed on a mileage scale.

(f) The order applicable to transportation wholly within the State of Alabama applies to all intrastate rates although some intrastate rates were higher than the prescribed rates interstate.

(g) There was no hearing, evidence or issue supporting a finding that all the rates on transportation wholly within the State of Alabama constituted a burden on interstate transportation.

(h) There was no evidence to support any order fixing intrastate rates on short lines of railway wholly within the State of Alabama.

(i) There was no evidence to support any order fixing the same rates applicable to single and to joint line hauls.

SUMMARY OF CONTENTIONS AND ARGUMENT.

The points on which appellees rely copied above are based on the assignments of error (R. 241) may be summarized as follows:

I. The orders complained of regulate commerce wholly intrastate when such commerce bears no substantial relation to and constitutes no burden on interstate commerce.

(A) Because such orders fix rates for transportation on shipments wholly within the State of Alabama and not shown to be and which are not competitive with interstate shipments.

(B) The Interstate Commerce Commission has no constitutional power to decrease intrastate rates.

II. The orders complained of violate the Acts to Regulate Commerce and are beyond the statutory power of the Interstate Commerce Commission.

(A) For the reasons stated in Sub-Division A of Paragraph I of this summary. (See above.)

(B) Because the issues and the testimony related only to violations of Section 3 of the Interstate Commerce Act and as to some of the intrastate rates prescribed by the Commission there was no issue and no showing of such a relation between the intrastate rates and the interstate rates as give statutory power to the Commission to act.

III. The orders complained of deny due process of law.

(A) Because the issues and the testimony related to the relationship of one set of rates to intrastate rates and the orders fix a relationship between such intrastate rates and another set of interstate rates.

(B) The petition of the carriers on which the order of investigation of the intrastate rates in Alabama was based claimed no violation of Section 15A of the Acts to Regulate Commerce and no evidence of such violation was shown although the order is sought to be sustained under said section.

(C) The issues and the testimony related to a system of rates which differentiate between hauls over one line and hauls over joint lines while the orders fix one rate applicable both to single and joint hauls.

IV. The orders sought to be enjoined were and are arbitrary and unjust.

(A) Because the rates prescribed intrastate are minimum rates while the rates interstate are maximum rates.

(B) Because the rates on import traffic are group and differential rates and the rates on intrastate traffic are mileage rates both sets of rates affecting the total charges for transportation.

(C) Because short lines wholly within the State of Alabama do not compete with the carriers engaged in hauling fertilizers interstate and are differently situated with reference to earnings and competition with trucks and there was no evidence showing any effect on or burden to interstate transportation because of the charges of these short-line-intrastate carriers.

V. The lack of testimony showing constitutional power or justifying its exercise, if power had existed; the absence of an issue comprehensive enough to constitute an opportunity for full hearing; the lack of substantial testimony as to the condition of short lines of railway in Alabama; of the relationship of joint hauls intrastate and interstate and the disregard of the issue and the testimony as to different rates for single and joint hauls show cumulatively that the Commission

acted arbitrarily and unjustly in issuing the orders sought to be enjoined.

I. THE CONSTITUTIONAL QUESTION: COMMERCE CLAUSE.

(A) PRELIMINARY STATEMENT OF APPLICABLE PRINCIPLES.

Constitutional questions present issues that must be submitted

> "to a judicial tribunal for determination upon its own independent judgment as to both law and facts." *Ohio Valley Water Co. v. Ben Avon Borough*, 253 U. S. 287, 289.

In *Louisville & Nashville R. Co. v. United States*, 238 U. S. 1, Lamar, J., said that,

> "since there is no contention at this time that the rate is confiscatory,"

the Court would leave it undisturbed as there was evidence to support it. In the course of argument in *Interstate Commerce Commission v. Louisville & Nashville R. Co.*, 227 U. S. 88, Assistant Attorney-General Fowler admitted that

> "the determination whether a rate is reasonable and the determination whether it is unconstitutional are governed by entirely different principles."

And in *Manufacturers' R. Co. v. United States*, 246 U. S. 457, at p. 488, the Court, speaking through Pitney, Jr., said:

> "So long as the Commission proceeds in accordance with the requirement of the Commerce Act, its administrative orders . . . . if made after due hearing and supported by evidence, are not subject to attack in the courts.

But the cases recognize that matters of constitutional right are not to be conclusively determined by the Commission."

In *Mississippi Railroad Commission v. Illinois Central R. R. Co.*, 203 U. S. 335, 344, Mr. Justice Peckman said:

> "In reviewing statutes and also orders made by a state railroad commission it frequently becomes necessary to examine the facts upon which they rest and determine from such examination whether there has been an unconstitutional exercise of power . . ."

In *Bluefield Improvement Company v. Public Service Commission*, 262 U. S. 679, 688, the lower court had held:

> "that the valuing of the property of a public utility corporation and prescribing rates are purely legislative acts not subject to judicial review except in so far as may be necessary to determine whether such rates are void on constitutional or other grounds; and that findings of fact by the Commission based on evidence to support them will not be reviewed."

There was testimony in the case from which the above quotation is taken that actual investment, less depreciation, amounted to $365,000; that reproduction cost (at 1915 prices, the valuation being made in 1920), less depreciation, was approximately $398,000; that reproduction cost, less depreciation, at 1920 prices, was $1,194,663, and that the proper valuation for rate-making purposes was $900,000. With this conflicting testimony the Supreme Court, holding that the testimony of the utiliy had been disregarded, said:

> "Plaintiff in error is entitled under the due process clause of the 14th Amendment *to the independent judgment of the court as to both law and facts. Ohio Valley Co. v. Ben Avon*, 253 U. S. 287, 289." (Emphasis supplied.)

See also *Am. Bar Asso. Journal* XIV No. 7, p. 361.

(B) THE ORDERS SOUGHT TO BE ENJOINED REGULATE COMMERCE WHOLLY INTRASTATE AND VIOLATE THAT PROVISION OF THE CONSTITUTION, ARTICLE I, SECTION 8, PARAGRAPH 3, WHICH LIMITS THE REGULATORY POWER OF THE CONGRESS TO "COMMERCE . . . AMONG THE SEVERAL STATES . . ."

1. Statement of the Applicable Facts.

The proceeding out of which grew the orders complained of was begun by the carriers filing a complaint with the Interstate Commerce Commission based on the claim that there had been a violation of Section 3 and part of Section 13, copied in the margin,(1) of the Acts to regulate Commerce(2). It is our contention that a burden on interstate commerce under Section 15a, copied in the margin(3), is not alleged. On this complaint the Commission ordered an investigation which could not and did not enlarge the issues made by the formal complaint(4).

(1) "Petitioners aver that the rates prescribed by the Alabama Public Service Commission, in its said order of May 26, 1924, on fertilizers and fertilizer materials, and articles taking the same rates, in carloads, for intrastate application between points in the State of Alabama, and now in effect, give an undue and unreasonable advantage, preference and prejudice as between persons and localities in intrastate commerce in Alabama on the one hand, and persons and localities in interstate commerce on the other hand, and are unjustly discriminatory against interstate commerce and place an undue burden upon interstate commerce, in violation of Section 3 and Sub-Divisions 3 and 4 of Section 13 of the Interstate Commerce Act as amended by Section 416 of the Transportation Act of 1920.

"Petitioners further show that if the said rates on fertilizers and fertilizer materials, and articles taking the same rates, so established by the Alabama Public Service Commission, are allowed to remain in effect, the purpose of the Interstate Commerce Act will be defeated and the result will be an undue and unreasonable advantage, preference or prejudice between persons and localities in interstate commerce, on the one hand, and intrastate commerce on the other, and that the interstate commerce will be unduly, unreasonably and unjustly discriminated against; all of which is forbidden and declared to be unlawful by the Interstate Commerce Act."

([2]) "Sec. 3. (As amended February 28, 1920.) (1) That it shall be unlawful for any common carrier subject to the provisions of this Act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

([3]) "Sec. 13-a. (As amended Febuary 28, 1920.) Whenever in any investigation under the provisions of this Act, or in any investigation instituted upon petition of the carrier concerned, which petition is hereby authorized to be filed, there shall be brought in issue any rate, fare, charge, classification, regulation, or practice, made or imposed by authority of any State, or initiated by the President during the period of Federal control, the Commission, before proceeding to hear and dispose of such issue, shall cause the State or States interested to be notified of the proceeding. The Commission may confer with the authorities of any State having regulatory jurisdiction over the class of persons and corporations subject to this Act with respect to the relationship between rate structures and practices of carriers subject to the jurisdiction of such State bodies and of the Commission; and to that end is authorized and empowered, under rules to be prescribed by it, and which may be modified

from time to time, to hold joint hearings with any such State regulating bodies on any matters wherein the Commission is empowered to act and where the rate-making authority of a State is or may be affected by the action taken by the Commission. The Commission is also authorized to avail itself of the co-operation, services, records, and facilities of such State authorities in the enforcement of any provision of this Act.

Paragraph 4 of Section 13:

"Whenever in any such investigation the Commission, after full hearing, finds that any such rate, fare, charge, classification, regulation, or practice causes any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce, which is hereby forbidden and declared to be unlawful, it shall prescribe the rate, fare, or charge, or the maximum or minimum, or maximum and minimum, thereafter to be charged, and the classification, regulation, or practice thereafter to be observed, in such manner as, in its judgment, will remove such advantage, preference, prejudice, or discrimination. Such rates, fares, charges, classifications, regulations, and practices shall be observed while in effect by the carriers parties to such proceeding affected thereby, the law of any State or the decision or order of any State authority to the contrary notwithstanding."

(³) Paragraph 2 of Sec. 15a. So far as material reads:

"(2) In the exercise of its power to prescribe just and reasonable rates the Commission shall initiate, modify, establish or adjust such rates so that carriers as a whole (or as a whole in each of such rate groups or territories as the Commission may from time to time designate) will, under honest, efficient and economical management and reasonable expenditures for maintenance of way, structures and equipment, earn an aggregate annual net railway operating income equal, as nearly as may be,

to a fair return upon the aggregate value of the railway property of such carriers."

Paragraph 3 of the same section reads:

"The Commission shall from time to time determine and make public what percentage of such aggregate property value constitutes a fair return thereon, and such percentage shall be uniform for all rate groups or territories which may be designated by the Commission. In making such determination it shall give due consideration, among other things, to the transportation needs of the country and the necessity (under honest, efficient and economical management of existing transportation facilities) of enlarging such facilities in order to provide the people of the United States with adequate transportation: Provided, That during the two years beginning March 1, 1920, the Commission shall take as such fair return a sum equal to 5½ per centum of such aggregate value, but may, in its discretion, add thereto a sum not exceeding one-half of one per centum of such aggregate value to make provision in whole or in part for improvements, betterments or equipment, which, according to the accounting system prescribed by the Commission, are chargeable to capital account.

"For the purposes of this section, such aggregate value of the property of the carriers shall be determined by the Commission from time to time and as often as may be necessary. The Commission may utilize the results of its investigation under Section 19a of this Act, in so far as deemed by it available, and shall give due consideration to all the elements of value recognized by the law of the land for rate-making purposes, and shall give to the property investment account of the carriers only that consideration which under such law it is entitled to in establishing values for rate-making purposes. Whenever pursuant to Section 19a of this Act the value of the railway property of any carrier held for and used in the service of transportation has been finally ascertained, the value so ascertained shall be deemed by the

Commission to be the value thereof for the purpose of determining such aggregate value."

(4) The Interstate Commerce Commission, on the 14th day of October, 1924, giving consideration to the complaint of the defendant railroads, and reciting facts of the complaint, ordered:

"(1) That an investigation be, and it is hereby instituted to determine whether the rates on fertilizers and fertilizer materials required by the Alabama Public Service Commission to be maintained by said railroads, cause or will cause any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate commerce or foreign commerce on the other hand, or any undue, unreasonable or unjust discrimination against interstate or foreign commerce; and as to what rates, if any, or what maximum or minimum, or maximum and minimum shall be prescribed to be charged by the petitioners, in order to remove such advantage, preference, prejudice or discrimination, if any, as may be found to exist."

ARGUMENT AND AUTHORITIES.

All that can reasonably be claimed to have been proven by any substantial testimony is that some rates from interior points in Alabama to points in that state toward its boundary are lower for similar mileage than the interstate rates to the same destinations. The intrastate rates were not when the Commission made its findings of fact and conclusions of law comparable with the rates found reasonable in such findings and conclusions for interstate transportation.

The intrastate rates differentiate between single line and joint line hauls, the interstate rates prescribed are the same for both classes of hauls.

Intrastate there were special rates over the Alabama Great Southern Railroad, Alabama, Tennessee & Northern Railroad Corporation, Mobile & Ohio Rail Road, and Southern Railway Company.

The rates applied between local stations on those lines within 200 miles of Meridian and six important Alabama cities, namely, Birmingham, Mobile, Montgomery, Selma and Tuscaloosa.

For single-line hauls the rates in Alabama prescribed by the Interstate Commerce Commission in the Meridian Rate Case, 66 I. C. C. 179, and which were not disturbed by the Alabama Commission's order, were higher than the average level of Interstate rates and are higher than the Interstate Commerce Commission prescribed.

The interstate rates prescribed were lower than these rates and than rates on the Illinois Central which was classified in Alabama as a weak line.

It is also true that the joint-line scale prescribed by the Alabama Commission, which was superseded by the scale

prescribed by the Interstate Commerce Commission, averages as high as the scale which the Interstate Commerce Commission prescribed, and that the joint-line movement of fertilizer was shown to constitute 33 per cent of the total movement. There was shown some indication of competition between shippers shipping from some of the interior points and shippers in other states shipping to the same destinations. As to many shipments within Alabama no competition is shown or attempted to be shown and none exists, and where there is an indication of competition there is equally an indication that the same shippers had plants shipping both interstate and intrastate to points in Alabama (R. 826, 827).

Competition is an essential element of a violation of Section 3 of the Act.(5)

(5) Proof of competition essential when unlawfulness under Section 3 of Acts to Regulate Commerce is involved. In the Party Rate Case, *Interstate Commerce Commission v. Baltimore & O. R. R. Co.*, 145 U. S. 263, this court held that before unlawfulness could exist under Sections 2 or 3 there must be "undue advantage to one or undue advantage to the other"; and quoted with approval from *Hozier & Caledonian v. R. Co.*, 17 Sess Cas. 302, 1 Nev. & McN. R. Cas. 27, the statement:

> "You must bring them into competition in order to give them an interest to complain."

This court further illustrating the principle for which we contend cited *Jones v. Eastern Counties R. Co.*, 3 C. B. N. S. 718; *Ransom v. Eastern Counties R. Co.*, 1 C. B. N. S. 437; *Oxlade v. Northwestern R. Co.*, 1 C. B. N. S. 454.

As early as 1892 in *Rice v. C. W. & B. R. Co.*, 3 I. C. R. 841, 849, 5 I. C. C. 193, the Interstate Commerce Commission, said:

"In the absence of some competing relation between different articles of traffic, there would seem to be no opportunity, by means solely of the rates imposed upon them respectively, for that unjust discrimination which the law forbids."

United States v. Illinois Central R. Company, 263 U. S. 515, 521, where it was held:

"Mere discrimination does not render a rate illegal under Section 3 of the Act to Regulate Commerce, but, to be obnoxious to that section, the discrimination must be unjust." (2 head note)

And *Am. Express Co. v. Caldwell*, 244 U. S. 617, 624.

Note the definite and specific findings of the Commission in the first Shreveport Case, 23 I. C. C. 31, 46. In affirming the order of the Commission the Supreme Court held that intrastate rates could be changed—

"*to the extent necessary* to remove the resulting unjust discrimination against interstate commerce arising out of the relation between such intrastate rates and interstate rates which are reasonable in themselves."

The Shreveport Case is discussed more in detail later.

The practice of the Commission was referred to by the Court in *Anchor Coal Co. v. United States*, 25 Fed. (2d) 462, 471, as follows:

"In this connection it is of interest to note that in proceedings under Section 3 of the Interstate Commerce Act (49 U. S. C. A. Section 3; Comp. St., Section 8563), where it is unquestionably proper to consider length of haul in determining whether the rates fixed by the same carrier for different communities are unduly prejudicial, the Commission will not condemn rates on that ground, even where the rate relationship may appear improper

measured by distance, in the *absence of proof of injury. Boston Port Differential Case*, 95 I. C. C. 539; *Perry County Coal Corp. v. East St. Louis Ry. Co.*, 80 I. C. C. 711. As shown above, a rate relationship cannot be injurious to a community, where the rate which that community enjoys is lower than the rate from a competing community with which it is compared."

Other cases typical of the construction of Section 3 by the Commission are:

Consumers Co. v. C. & N. W. Ry. Co., 36 I. C. C. 259, 261:

"unjust discrimination under Section 3 of the act ordinarily requires that the prejudice suffered by one person shall be a source of positive advantage to another and that a competitive relation shall exist between the persons, localities, or commodities concerned."

In *California Walnut Growers Asso. v. V. & R. R. R. Co.*, 50 I. C. C. 558, 568, the Commission said:

"It is well settled that discrimination under the third section to be undue and unlawful must ordinarily be such that the prejudice arising out of it against one party is a source of advantage to the other alleged to be favored and that generally a competitive relationship between the commodities must appear."

Garratt-Callahan Co. v. A. C. L. R. R. Co., 88 I. C. C. 103, 106:

"Prejudice to be undue under Section 3 must ordinarily be such that the prejudice suffered by one person shall be *a source of positive advantage* to another and that a competitive relation shall exist between the persons or commodities affected. *Consumers Co. v. C. & N. W. Ry. Co.*, 36 I. C. C. 259; *Schlicher v. Director General*, 62 I. C. C. 181."

El Dorado Chamber of Commerce v. C., R. I. & P. Ry. Co., 89 I. C. C. 743, 744:

"The evidence introduced was confined to the rate situation. *Mere reference to a lower charge at other points is not sufficient to establish undue preference and prejudice.*"

Utah State Automobile Asso. v. A., T. & S. F. Ry. Co., 92 I. C. C. 376, 386:

"Undoubtedly there is here a preference, but the question is whether the preference is undue or unreasonable and results in any undue or unreasonable prejudice to complainant. The test, under the allegations of the complaint, is whether complainant suffers injury by reason of the preference."

Pensacola Chamber of Commerce v. L. & N. R. R. Co., 98 I. C. C. 567, 570:

"Disparity in rates does not necessarily result in undue prejudice. It must also appear that shipments are made under those rates or that shipments are hindered or prevented because of the rate relationship. *The element of competition is usually potent.*"

Detroit & Cleveland Nav. Co. v. M. C. R. R. Co., 102 I. C. C. 607, 609:

"In support of its allegations of undue prejudice and unjust discrimination complainant relies mainly on the fact that shippers at points of origin in lower Michigan are deprived of whatever benefits they might derive from differential rates while those located at Cleveland and Buffalo may avail themselves of such benefits. It cites *White Star Line v. N. Y. C. R. R. Co.*, 83 I. C. C. 473, wherein we found that the refusal of certain defendants to establish through routes and joint rates with the complainant therein was unduly prejudicial. But in that

case it was shown that the defendants participated in through routes and joint rates with a *competitor of complainant*, and the allegation of undue prejudice was clearly established. Prejudice is rarely undue unless the parties prejudiced and those preferred are upon a *competitive basis*. Complainant has made no showing that such a condition exists here; nor do the facts of record support the allegation of unjust discrimination."

And the Congress has acquiesced.

In this case, 113 I. C. C. 389, at p. 432 (R. 93), the Commission says:

". . . but specific consideration of the present interstate rates is unnecessary, for they will be changed under our findings herein.

". . . the conclusion is inevitable that the application of rates thereon (meaning on intrastate traffic) substantially lower than the interstate rates contemporaneously applied under similar conditions must bring about, *in some degree at least*, the unjust discrimination against interstate commerce . . . declared by the act to be unlawful." (Emphasis ours.)

The Commission thus finds the intrastate rates unjustly to discriminate not against existing rates complained of and not specifically considered, but against future rates which the Commission will prescribe, and which were prescribed long after any hearings were had. It also holds that the maintenance of the intrastate rates will bring about unjust discrimination "in some degree at least." Where "some degree" applies and where not, is not stated.

In *American Express Co. v. South Dakota*, 244 U. S. 617, at 625, 626, 61 L. Ed. 1352, at 1358, the Supreme Court said:

"For the power of the Commission is dominant only to the extent that the exercise is found by it to be neces-

sary to remove the existing discrimination against interstate traffic."

The Interstate Commerce Commission seeks to exercise "dominant" power beyond where there is any adumbration of unlawful discrimination.

SHREVEPORT CASES.

Beginning with what has come to be called the Shreveport Case, the courts have in certain cases sustained the power of the Interstate Commerce Commission to prescribe rates applicable wholly within a state. We do not question the legality or propriety of exercising that power when the facts justify. It is, however, an unusual power, one that should never be exercised unless fully authorized.

While the power of the federal government to regulate interstate commerce is paramount and must control, and that power in appropriate cases extends sufficiently far to protect interstate commerce from burden, the right to exercise the power must be clearly established and the burden on interstate commerce must be definite and substantial.

Since the original Shreveport Case the question has been presented to the Supreme Court in other cases, all of these cases being usually designated under the generic term "Shreveport Cases." We shall discuss such of those cases as appear to be sufficiently like the facts of this case to make such discussion helpful. All such cases recognize that wholly intrastate commerce cannot be regulated by the federal agency.

The germ of the idea which justifies and limits the Shreveport Cases was announced as early as 1824. Chief Justice Marshall, discussing the Commerce Clause in *Gibbons v. Ogden* (1824) 9 Wheat. 22 (U. S.) 1, says:

> "It is not intended to say that these words comprehend that commerce which is completely internal, which is carried on between man and man in a state, or between different parts of the same state, and which does not extend to or affect other states. Such a power would be inconvenient, and is certainly unnecessary."

The first Shreveport Case had its beginning in a com-

plaint brought by the Railroad Commission of Louisiana against the St. L. S. W. Railway Company, the report of the Commission in which is found in 23 I. C. C. beginning at page 31.

Properly to understand the decision of the case by this Court and the principles established, the opinion of the Commission should be considered. It will be noted that the Commission points out, beginning at page 35, specific and definite acts of the authorities of Texas which preferred and avowedly preferred Texas shippers over shippers at Shreveport, in the State of Louisiana. The Commission specifically found, page 46, that rates out of Shreveport to named points in Texas were unjust and unreasonable and that lower rates than those found to be reasonable from Shreveport into Texas could not be maintained between such points in Texas without burdening interstate commerce. There was a definite finding based upon undisputed testimony that the agents of the State of Texas had deliberately, avowedly, and successfully placed a burden upon interstate shippers to their prejudice and to the advantage of Texas shippers.

When the matter came to this Court, under the title "*Houston East and West Texas Railway v. United States*, 234 U. S. 342," this Court, in giving the facts, stated and relied upon the same character of testimony that the Commission had found to exist. A few illustrations will be given:

Page 346: "It is undisputed that the difference was substantial and injuriously affected the commerce of Shreveport;"

"rates out of Shreveport to named Texas points;"

Page 347: "from cities in Texas to such points under substantially similar conditions and circumstances;"

"against Shreveport;"

"Shreveport to Dallas and Houston;"

and, p. 353, speaking of the law, and citing Employers Liability Cases, 207 U. S. 463, you pointed out that the first Employers Liability Act was held unconstitutional because it referred to employment which "had no connection whatever with interstate commerce." That is true certainly of a portion if not of all of the intrastate rates in Alabama.

And further showing the limitations on the power of Congress, you, at page 357, said:

> "Congress thus defined the scope of its regulation, and provided that it was not to extend to purely intrastate traffic. It did not undertake to authorize the Commission to prescribe intrastate rates, and thus to establish a unified control by the exercise of the rate-making power over both descriptions of traffic. Undoubtedly, in the absence of a finding by the Commission of unjust discrimination—intrastate rates were left to be fixed by the carrier, and subject to the authority of the states, or of the agencies created by the states."

It is interesting and important to observe how careful this Court was in this initial case to limit the power of the federal agency and to protect the constitutional rights of the states.

This caution is further illustrated in the case of *Chicago, M. & St. P. R. Co. v. State Public Utilities Com. of Ill.*, 242 U. S. 333. There it was definitely held that unless there was proven a relationship between the rates of the state sought to be increased and the interstate rates sought to be imposed on the state, there was no power in the federal agency to act. At page 337 of the opinion, after calling attention to the paramount constitutional power of Congress and to the case of *Missouri Pacific R. Co. v. Larabee Flour Mills Co.*, 211 U. S. 612, you said:

> "But it was decided that Congress had not exercised this power by the enactment of the Interstate Commerce Act."

This means that the full constitutional power has not yet been exercised by the Congress. Showing these limitations, on the same page of the opinion you said:

> "It was proper for the Interstate Commerce Commission to consider the rate as part of a through rate from points outside of the state. It was equally proper for the State Commission to consider it as part of the intrastate haul, and we do not think the rates were so related as to exclude the exercise of jurisdiction by the State Commission."

In the case just cited the state rate was lower than the interstate rate but the court did not deem that sufficient proof, and said:

> "But a relation is asserted between the state and interstate haul because it is said to be manifest that the order of the State Commission gives commercial advantages to shippers and producers of coal in Illinois over shippers and producers outside of the state. But there is nothing in the record that justifies the confidence of the assertion. There are too many factors to be considered for such offhand declaration to be accepted. Some relation we may admit between the state and interstate service, but the evidence does not bring it within that certainty and precision of influence that induced the decision in *Houston E. & W. T. R. Co. v. United States*, 234 U. S. 342, but leaves it controlled by the *Minnesota Rate Cases, supra; Oregon R. & Nav. Co. v. Campbell*, 230 U. S. 525; and *Louisville & N. R. Co. v. Garrett*, 231 U. S. 298. Therefore, the order is not subject to the charges against it, and Secs. 3, 13, and 15 of the Interstate Commerce Act have no application."

A more striking case illustrating the limitations on the power of Congress to regulate intrastate rates and the care of this Court not to invade the rights of the state, is that of *American Express Company v. South Dakota*, 244 U. S. 617.

Using the pages of this opinion, we call attention to the limitations required by the Supreme Court:

Page 619: "Shippers of Sioux City, Iowa, complained;"

Page 620: "The report makes clear that the order applied only to competitive territory and that this is the southeastern section of South Dakota;"

Page 621: The proceedings sought "to enjoin them from putting into effect the special tariffs covering *all* their rates within the state;" (Emphasis in opinion.)

Page 623: "specified towns to which the rates are applied are named;"

Page 624: Speaking of the Commission's order "in its specific direction the order merely prohibits charging higher rates to and from Sioux City than to and from five South Dakota cities;"

Page 624: "But the finding that discrimination exists and that the interstate rates are reasonable does not necessarily imply a finding that the intrastate rates are unreasonable. Both rates may lie within the zone of reasonableness and yet involve unjust discrimination. *Interstate Commerce Commission v. Baltimore & O. R. Co.*, 145 U. S. 263, 277."

Page 625: "The territory to which it should apply;"

"to and from which rates must be changed;"

"The Commission's order can not serve as a justification for disregarding a requirement or order issued under state authority unless and except so far as it is definite as to the *territory or points to which it applies;*"

Page 625-6: "For the power of the Commission is dominant only to the extent that the exercise is found by it to be necessary to remove the existing discrimination against interstate traffic."

Page 627: "The express companies were not warranted by anything in the order in extending the special

> tariffs of rates to and from the five cities to include 'Points' in every part of the state. As to all rate advances other than those in the competitive territory, their action was unauthorized."

Under these circumstances this Court granted an injunction because the tariffs referred to *all* the rates in the state and were not limited to the *specific* rates as to which the pleadings and evidence justified a finding of discrimination.

It is definitely established by the authorities to which reference has just been made, that there must be a relation between the rates interstate and the rates intrastate, which the Interstate Commerce Commission may regulate. It is submitted that there was no such general relation shown in this case. As to about one-third of the movement intrastate in Alabama the rates are joint-line rates and are equal to or in excess of the single and joint-line rates established by the Interstate Commerce Commission. It is also definitely shown of record that as a result of the Interstate Commerce Commission's decision in the Meridian Case, 66 I. C. C. 179, four railroads, to-wit, Alabama Great Southern; Alabama, Tennessee & Northern; Mobile & Ohio, and Southern, as to certain stations had at the time of the decision of the Interstate Commerce Commission in this case rates as high or higher than as fixed by the Interstate Commerce Commission and it was also shown that the Illinois Central intrastate in Alabama was treated as a weak line, and because of such consideration had rates as high or higher than the rates prescribed by the Interstate Commerce Commission in this case, and it will be noted further in the statement of the testimony in the Appendix hereof, pp. 19-20, that there is practically no testimony as to the condition and relative rates of the short lines in Alabama.

In the case now before this Court there is no definite naming of any cities that are competitive; if there were, to

that extent the Commission's order might be valid unless invalid for other reasons herein discussed, but certainly in the absence of any specific findings and in the absence of any definite limitations in the tariffs, the orders of the Interstate Commerce Commission are void.

In *American Express Co. v. South Dakota*, 244 U. S. 617, 625, this Court held that there must be definiteness in the findings and order, and said:

> "Where, as here, there is a conflict between the Federal and the State authorities, the Commission's order cannot serve as a justification for disregarding a regulation or order issued under state authority *unless, and except so far as, it is definite as to the territory or points to which it applies.* For the power of the Commission is dominant only to the extent that the exercise is found by it to be necessary to remove the existing discrimination against interstate traffic." (Emphasis ours.)

This rule was quoted and followed in *Illinois Central R. Co. v. Public Utilities Com.*, 245 U. S. 493, the report there dealt "with the intrastate rates in so far only as they result in discrimination against interstate traffic to and from St. Louis and Keokuk." The complaint and evidence here deal with only a few points. There it was said (p. 509):

> "To be effective in respect of intrastate rates established and maintained under state authority an order of the Commission of the kind now under consideration must have a definite field of operation, and not leave the territory or points to which it applies uncertain."

After quoting as above from the South Dakota Case, the conclusion was:

> "We conclude that the uncertainty in this order is such as to render it inoperative and of no effect as to the intrastate rates established and maintained under a law of the

state, and therefore, that the suits by the carrier were rightly dismissed on merits."

See rule of Strict Construction, p. 510.

In *Railroad Commission of Wisconsin v. Chicago B. & Q. R. Co.*, 257 U. S. 563, Section 15a as well as Section 3 of the Act was involved. In the case at bar Section 3 is the section claimed to have been violated. The order there was held to be void under Section 3, but was sustained under Section 15a. There, after discussing former Shreveport Cases, the Chief Justice said (p. 579):

> "The order in this case, however, is much wider than the orders made in the proceedings following the Shreveport and Illinois C. R. Co. Cases. There, as here, the report of the Commission showed discrimination against persons and localities at border points, and the orders were extended to include all rates or fares from all points in the state to border points. But *this order is not so restricted. It includes fares between all interior points, although neither may be near the border, and the fares between them may not work a discrimination against interstate travelers at all. Nothing in the precedents cited justifies an order affecting all rates of a general description when it is clear that this would include many rates not within the proper class or the reason of the order.* In such a case, the saving clause by which exceptions are permitted cannot give the order validity. As said by this court in the Illinois Central R. Co. case: 'It is obvious that an order of a subordinate agency, such as the Commission, should not be given a precedence over a state rate statute, otherwise valid, unless, and except so far as, it conforms to a *high standard of certainty.*' See also *American Express Co. v. South Dakota*, 244 U. S. 617.
>
> "If, in view of the changes, made by Federal authority, in a large class of discriminating state rates, it is necessary from a state point of view to change non-discrimination state rates to harmonize with them *only*

> *the state authorities can produce such harmony. We cannot sustain the sweep of the order* in this case on the showing of discriminations against persons or places alone." (Emphasis ours.)

And as showing the limits of the power of the Interstate Commerce Commission (pp. 590, 591):

> "It (this power) does not involve general regulation of intrastate commerce. Action of the Interstate Commerce Commission in this regard should be directed to substantial disparity which operates as a real discrimination against, and obstruction to, interstate commerce, and must leave appropriate discretion to the state authorities to deal with intrastate rates as between themselves on the general level which the Interstate Commerce Commission has found to be fair to Interstate Commerce."

It is interesting to contrast the Wisconsin Case with this. There (see ex parte 74, Increased Rates 1920, 58 I. C. C. 237), the Western carriers to earn the standard return needed $401,215,984 but received only $265,185,254. Here the Southern carriers earned in excess of the standard return. This testimony of complainant Alabama Public Service Commission might have been, but was not, explained or denied. The form of the order in the Wisconsin Case was similar to these here but the substance of the testimony and the finding there are unlike these here.

How carefully this Court has observed these limitations appears from all its Shreveport Cases. To refer again to the Illinois and Wisconsin Cases:

In 245 U. S. 493, the Illinois Case, *supra*, the power to regulate intrastate commerce was limited to those rates which resulted in unlawful discrimination against interstate traffic to and from St. Louis and Keokuk, and it was stated by the court that the order of the Commission *"must have a definite field of operation."*

The Wisconsin Case, 257 U. S. 563, *supra*, so far as Section 3 was involved, is legally identical with the case now before the court. There the order of the Interstate Commerce Commission was based upon two grounds; one, Section 3, as is the order in this case, and the other, Section 15a which is not involved here. This Court said that under Section 3 the order of the Interstate Commerce Commission was void, but sustained it under Section 15a. The application of this principle means that the order in this case is void. It will be noted from the quotation, ante, that in the Wisconsin Case it was held, "We cannot sustain the *sweep of the order in this case on the showing of discrimination against persons and places alone*," and, further, this Court said the Congressional grant of power did not involve general regulation of intrastate commerce and that there must be substantial reasons for exercising that power.

Further emphasis of this care of this Court and the limits which it has placed upon the rule of the Shreveport Cases appears in *Arkansas Railway Company v. Chicago R. I. & P. R. Co.*, 274 U. S. 597. The principles are summed up, cases cited and in concluding the opinion, it was said:

> *"The intention to interfere with the state function of regulating intrastate rates is not to be presumed.* Where there is a serious doubt whether an order of the Interstate Commerce Commission extends to intrastate rates, *the doubt should be resolved in favor of the state power.* If, as the railroad believed, the federal commission intended to include the intrastate Arkansas rates within its order, it should have taken action, through appropriate application, to remove the doubt by securing an expression by that Commission of the intention so to do. Compare *American Express Co. v. South Dakota*, 244 U. S. 617, 627, 61 L. Ed. 1352, 1359, P. U. R. 1917F, 45, 37 Sup. Ct. Rep. 656; *Illinois C. R. Co. v. State Pub. Utilities Commission*, 245 U. S. 493, 509, 510, 62 L. Ed.

425, 438, P. U. R. 19180, 279, 38 Sup. Ct. Rep. 170." (Emphasis ours.)

But appellees contended below and probably will here that Section 15a authorizes the orders complained of. The answer to such claim is that there was neither pleading nor testimony supporting any finding under Section 15a nor is it apparent that the Commission made any such finding. We are aware that pleadings before the Commission are not technical but there must be some pleadings and substantial evidence. It is true that the law need not be pleaded (*Chicago R. I. & P. Ry. v. United States*, 274 U. S. 29) but the rules of the Commission require such definite statement of violations as fairly will inform the respondents what violations of law are charged. Certain sections were pleaded (Section 3 and Paragraphs 3 and 4 of 13) and thus the issues are limited. *Expressio unius est exclusio alterius.* We are justified especially in view of the high annual earnings of Southern carriers shown of record to be 5.88 per cent, in assuming that such carriers did not desire to make an issue under Section 15a. Later, we shall discuss the application of the due process clause of the Fifth Amendment. Here we call attention to rules applicable to this as well as the issue later to be discussed. The Alabama Public Service Commission was charged with notice of a complaint under Section 3. Section 13 is but a rule of procedure, and no order could be valid broader than the complaint. *Washington etc. R. Co. v. Fairchild*, 224 U. S. 510, 525, 526. The Commission itself in *Schlicher v. Director General*, 62 I. C. C. 181, 184, 185, said:

> "Complainants have never sought leave to amend their complaint to broaden the issue it originally stated, or to make the issue conform to the proof. While it is not our policy to be unduly technical in the matter of pleadings, Rule III, Paragraph (m), of the Rules of Practice provides that—

"In case undue or unreasonable preference or advantage or undue or unreasonable prejudice or disadvantage, in violation of Section 3 is alleged, the particular person, company, firm, corporation, locality, or description of traffic affected thereby, and the particular preference or advantage, or prejudice or disadvantage, relied upon as constituting such violation, should be clearly specified.

"That rule is applicable generally to all proceedings before us. Here we are acting in a quasi-judicial capacity. *Mitchell Coal Co. v. Penna. R. R. Co.*, 230 U. S. 247; *Cattle Raisers' Asso. v. C., B. & Q. R. Co.*, 10 I. C. C. 83, 91."

Had there been pleading there was no evidence. Contrast the evidence in the Shreveport Cases in which this Court has permitted under Section 3 the Commission to regulate intrastate rates with this record. Likewise contrast with this record the record in the Wisconsin Case where an order under Section 15a was sustained. The only testimony on the subject showed that the carriers were earning when this case was heard more than they should under Section 15a. (See exhibit 476, R. 832, *et seq.*) In summary sheet 10, this exhibit shows the following as the average percentage of return:

	1920 (4 mos.)	1921	1922	1923
Eastern District	0.97 (Dr)	3.80	5.09	6.89
Southern District	0.84	3.28	5.27	5.88
Western District	1.38	3.69	4.16	6.46

It is true that some of the factors used in arriving at these figures were the best judgment of the witness and may be subject to change, but the carriers here defendant with full information in their possession, did not choose to contest these conclusions.

(C) THE INTERSTATE COMMERCE COMMISSION HAS NO CONSTITUTIONAL POWER TO DECREASE INTRASTATE RATES.

I. APPLICABLE FACTS.

The Commission in the Meridian Case, 66 I. C. C. 179, 187, prescribed rates on fertilizers into Alabama higher than the general intrastate rates and these interstate rates became the rates intrastate on the Alabama Great Southern, the Alabama, Tenn. & N. R. Corp., the Mobile & Ohio, and the Southern Railway Company in Alabama.

The Illinois Central Railroad, as already stated, was conceded intrastate in Alabama rates higher than the interstate rates prescribed.

The witness Drescher testified that the scale of rates prescribed in July, 1924, by the Alabama Commission does not apply from Birmingham to stations on the Alabama Great Southern Railway between Birmingham and Meridian and that the disparities as between state and interstate rates shown in his exhibits do not exist in the rates from Birmingham, Ala., against Meridian, Miss., to stations on the Alabama Great Southern Railway between these points; that such rates are more nearly in line one with the other due to the order of the Interstate Commerce Commission in the Meridian Case (R. 462-467, Appendix 16-17).

Exhibit No. 181 (461) shows the present rates on fertilizer from Birmingham, Ala., and Meridian, Miss., to points on the Alabama Great Southern Railroad between those cities, and the rates for corresponding distances on basis of the Third Royster Scale. The present rates are on the whole slightly lower than the rates shown in the Third Royster Scale.

The witness Drescher testified that an inconsistent and anomalous situation existed in the present adjustment of rates on fertilizer in Alabama in connection with the rates from Montgomery to certain stations on the Mobile & Ohio Rail Road and from Birmingham to stations on the Alabama Great

Southern Railroad located in so-called Meridian territory; that the Alabama scale is not applied from Montgomery to stations on the Mobile & Ohio Rail Road west of Tuscaloosa, or from Birmingham, Ala., to various stations on the Alabama Great Southern Railroad west of Tuscaloosa because of the order of the Interstate Commerce Commission in the Meridian Case (R. 462-467). The rates which have direct application from Montgomery over the Mobile & Ohio Rail Road and from Birmingham over the Alabama Great Southern Railroad to stations on those lines west of Tuscaloosa are higher than the joint-line scale prescribed by the Alabama Commission applicable over the Louisville & Nashville Railroad in connection with the Mobile & Ohio Rail Road or the Alabama Great Southern Railroad via Tuscaloosa.

The Commission in its order in this case (113 I. C. C. 425, R. 83, 84) made lower rates than these intrastate rates.

ARGUMENT AND AUTHORITIES.

The Interstate Commerce Commission has no constitutional power to regulate rates on intrastate commerce which rates benefit *interstate* commerce. This authority exists only when there is a burden on interstate commerce. See *Gulf Refining Company v. Southern Railway Company*, 102 I. C. C. 274, 276, for an obviously correct statement of the principle.

II. THE ACTS TO REGULATE COMMERCE DENY POWER TO PRESCRIBE RATES ON TRANSPORTATION WHOLLY WITHIN ALABAMA.

(A) and (B). Sub-paragraphs (A) and (B) under Paragraph I above present the arguments and facts applicable to this proposition. The only difference is that there is discussed the claim that the orders complained of violate the commerce clause of the federal constitution and

here the discussion relates to the claim that the orders are in violation of Section 1, Paragraph 2, Sub-paragraph (a) of the Interstate Commerce Act which reads:

> "The provisions of this Act . . . shall not apply—(A) To the transportation of passengers or property or to the receiving, delivering, storage or handling of property wholly within one state and not shipped to or from a foreign country from or to any place in the United States . . ."

ARGUMENT AND AUTHORITIES.

In *Houston etc. R. Co. v. United States*, the Shreveport Case, 234 U. S. 342, 357, this Court copied the limitation stated in the above statute and said:

> "Congress thus defined the scope of its regulation, and provided that it was not to extend to purely intrastate traffic. It did not undertake to authorize the Commission to prescribe intrastate rates, and thus to establish a *unified control* by the exercise of the rate-making power over both descriptions of traffic. Undoubtedly—in the absence of a finding by the Commission of unjust discrimination—intrastate rates were left to be fixed by the carrier, and subject to the authority of the states, or of the agencies created by the states. This was the question recently decided by this court in the Minnesota Rate Case (*Simpson v. Shepard*), 230 U. S. 352, 57 L. Ed. 1511, 48 L. R. A. (N. S.) 1151, 33 Sup. Ct. Rep. 729. There, the State of Minnesota had established reasonable rates for intrastate transportation throughout the state, and it was contended that, by reason of the passage of the act to regulate commerce, the state could no longer exercise the state-wide authority for this purpose which it had formerly enjoyed; and the court was asked to hold that an *entire scheme of intrastate* rates, otherwise validly established, was null and void because of its effect upon interstate rates. There had been no finding by the Interstate Commerce Commission of any unjust *discrimination*."

Here, as the facts stated above show, no violation of Section 3 exists, certainly as to some of the transportation "wholly within" the State of Alabama; and, unless mere proof of a difference in the measure of rates interstate and intrastate gives power to the Interstate Commerce Commission to regulate intrastate rates in Alabama, the orders complained of exceed the limits of the authority conferred on that Commission. Because Alabama rates on one-third of the traffic are equal to or in excess of interstate rates, and that in addition to this third of the traffic on five roads in the state the interstate rates are higher than intrastate rates is no justification or power to the Interstate Commerce Commission to regulate all intrastate rates. Mere difference is not unlawful.

The statute shows that there is a residuum of power in the states but if the orders in this case are valid there is no power whatsoever left in state agencies over intrastate rates. Such a conclusion violates the Tenth Amendment to the Constitution which reserves to the states undelegated powers. It must be remembered that the limitation quoted above was in the original act and has not been repealed or materially changed by subsequent amendments. It would be interesting if appellees will point out what power the orders in this case leave the Alabama Public Service Commission with reference to the rates involved and further to point out any testimony that shows that all the intrastate rates in Alabama on fertilizers and fertilizer materials constitute any violation of Section 3 of the Act or so project their influence as to burden rates on transportation not wholly within one state. Certainly appellees cannot contend that even were there pleadings or issues to sustain their position that there is testimony that all or any state rates burden interstate commerce in violation of Section 15a. This record shows (R. 672, 819, 826, Appendix 26) that short line roads in Alabama have truck competition not met on the larger interstate hauls. This "distin-

guishes the transportation conditions . . . and removes it from the purview of Section 3 of the Act." *Caddo etc. Oil Co. v. Kansas City Southern Ry. Co.*, 98 I. C. C. 39, 42. If the short line roads are compelled to increase rates to the interstate level the trucks will haul the freight and both interstate and intrastate revenues in the aggregate will be less. It is not only in violation of the statute but actually injurious for the federal agency to regulate *all* rates intrastate merely because some intrastate rates may be lower than interstate rates. To sustain the orders complained of repeals Sub-paragraph (A) of Paragraph 2 of Section 1 of the Act to Regulate Commerce, and, so far as the regulation of the charges of railroads, reduces state commissions to a condition of helpless desuetude.

(C) SPECIFIC ALLEGATIONS OF VIOLATION OF SECTION 3 AND PARAGRAPHS 3 AND 4 OF SECTION 13 DO NOT RAISE AN ISSUE UNDER SECTION 15A.

STATEMENT.

The complaint against the rates in Alabama specifically charged violation of Sections 3 and 13 and did not name Section 15a (R. 206, Appendix 34). The order of investigation did not name 15a (R. 207), Appendix 34). There was no testimony that the carriers were earning less than the standard rate of return but the record shows that southern carriers were earning in excess of such standard, to-wit, 5.88 per cent. The discussion relates to this proposition and need not be repeated.

III. DUE PROCESS OF LAW DENIED.

(A) STATE RATES WERE ALLEGED TO PREJUDICE INTERSTATE SHIPPERS BECAUSE DIF-

FERING FROM EXISTING INTERSTATE RATES, AND WERE FOUND DISCRIMINATORY OF INTERSTATE RATES LATER PRESCRIBED.

STATEMENT OF FACTS.

On July 30, 1924, the carriers complained that the Alabama rates established May 26, 1924, and made effective July 25, 1924, were "lower than the level of interstate rates (then) applying from points in other States to Alabama destinations" (R. 195 and 200, par. 12, Appendix 6). In preceding paragraphs of this complaint (6-11) the carriers described how the interstate rates were made and in Paragraph 13 specifically alleged wherein such interstate rates were unduly prejudiced by the Alabama rates (R. 196).

At the time this complaint of the carriers was filed and when it was heard and argued, there were both intrastate and interstate rates higher for joint line than for single-line hauls. No party to the complaint sought to change the rule prescribing higher rates for joint-line hauls than for single line hauls. On this point the Commission (113 I. C. C. 422, R. 80, Appendix 32) said: "Carriers and shippers both acquiesced in the idea that the rates should be somewhat higher for joint-line than for single-line hauls." Disregarding this acquiescence, the Commission adopted on interstate hauls the same scale of rates for joint and single-line hauls (113 I. C. C. 423, R. 81, Appendix 32), saying:

> "Manifestly when no additions are allowed for joint-line service and when short-line distances are used as a measure the single-line scale should be correspondingly increased . . . . . Under no circumstances the elimination of joint line arbitraries will require a comparatively small increase in the single-line scale."

The Alabama rates required a carload minimum 5 tons higher than the interstate rate alleged in the complaint to be prejudiced (113 I. C. C. 432, R. 63).

The Commission (113 I. C. C. 425, R. 83) prescribed July 19, 1926, a new and entirely different scale for interstate application, with a higher minimum than formerly applied, specified certain rates intrastate in Alabama, compared them with the newly established interstate rates (113 I. C. C. 431, R. 83, 86, Appendix 29), and found that:

> "While exact harmony between intrastate and interstate rates may not in all cases be required by the law, nevertheless when there is such a preponderance of intrastate traffic as here obtains, the conclusion is inevitable that the application of rates thereon substantially lower than the interstate rates contemporaneously applied under similar conditions must bring about, in some degree at least, the unjust discrimination against interstate commerce as well as the undue prejudice to persons or localities in interstate commerce which are declared by the act to be unlawful." (R. 93.)

ARGUMENT AND AUTHORITIES.

The Fifth Amendment to the Constitution of the United States and the Act to Regulate Commerce give the right to a full hearing and as said by this Court, *Interstate Commerce Commission v. Louisville & N. R. Co.*, 227 U. S. 88, orders of the Commission are void "If a hearing was denied; (or) if that granted was inadequate or manifestly unfair."

It is submitted that where the hearing relates to the relationship of one to another rate and when a relation is established between the one rate and an entirely different rate never before the Commission nor known to the parties, that the hearing is "inadequate and manifestly unfair."

The issue was that rates A existing in Alabama were unduly prejudicial to shippers using rates B on interstate shipments; the order was that rates A were unduly prejudicial to rates X established two years after the issue was made.

While we do not question the right of the Interstate Commerce Commission in the interstate rates involved to fix specific rates, we do insist that a state's rates can never be regulated by the federal agency until there is a specific comparison and hearing and testimony as to the rates interstate with which the state rates are contrasted. The complaint of the trunk line carriers said that the relation of rates of July 30, 1924, unduly preferred the state rates in Alabama and unjustly burdened interstate commerce. The Commission found that the rates it conceived to be reasonable two years later, in July, 1926, created a relationship between interstate and intrastate rates that burdened the former. The issue made was not the same as the issue decided. On the issue decided there has never yet been any hearing or any testimony. This principle is followed by the Commission itself. *Virginia v. A. & R. R. R.*, 136 I. C. C. 173.

In *Illinois Central R. Co. v. R. R. Com. of Kentucky*, 1 F. (2d) 805, a state commission's rates were sought to be set aside. There, as here, there had been no hearing as to the particular rate nor as "to the conditions existing in July, 1922, when the order now in question was made" (p. 806). There "the railroad had no knowledge until the opinion of the Commission was filed" as to the particular rate. Here the Alabama authorities "had no knowledge until the opinion of the Commission was filed" July 19, 1926, as to the particular interstate rate which in said opinion was made the absolute measure of the Alabama intrastate rates. The court there, at page 806, said:

> "The question whether interstate rates are discriminatory as between shippers is one of which the courts have now no jurisdiction. There must be a hearing on that subject before the Interstate Commerce Commission and a finding by it. *Texas Co. v. Abilene Co.*, 204 U. S. 426, 440. We see no reason for any different rule as to discrimination between interstate and intrastate rates.

We think the Transportation Act contemplates that an intrastate rate should be condemned for this reason only after there has been such a hearing and such a finding, not only of discrimination, but of *undue discrimination;* and such has been the practice. *Railroad Commission of Wisconsin v. Chicago Co.*, 257 U. S. 563; *United States v. Tennessee*, 262 U. S. 318. *Ex Parte* 74 *cannot take the place of such a hearing and finding; it neither pertains to intrastate rates nor to the conditions existing in July*, 1922, *when the order now in question was made.* . . . "The case is analogous to that considered in *Florida, etc. Co. v. U. S.*, 234 U. S. 167, 185, 186. 'The inquiry narrows itself to the mere consideration of' the testimony which the commission selected as that upon which it planted its order, and the commission should be treated as justifying its conclusion only by comparison with those schedules. So far as the record shows, these were not put in evidence or in any way referred to at the hearing, and the *railroad had no knowledge until the opinion of the Commisson was filed*, that these Cairo south-bound rates were claimed to have any bearing on the issue. The natural inference from the record is that these schedules were on file with the Commission pursuant to the general provisions of the law, and that it thought itself entitled to resort to them and base its conclusion thereon, merely because it had knowledge of them in this way. It was decided in *Interstate Commerce Com'n. v. L. & N. R. Co.*, 227 U. S. 88, 93, that a Commission cannot base a finding upon the schedules and other general information which it has in its files, unless they were put in evidence in the particular proceeding, and opportunity given to the railroad to meet and explain them. This same general rule was stated and applied in *U. S. v. L. & N.*, 235 U. S. 314, at page 321, and the *Florida, etc. Co. Case, supra*, gives us an instance of the kind of proof that has superficial force, but is not considered substantial enough to support a commission's findings." (Emphasis ours.)

As stated in the New England Divisions Case, *Akron, C. & Y. R. v. U. S.*, 261 U. S. 184, 200:

"A full hearing is one in which ample opportunity is afforded to all parties to make, by evidence and argument, a showing fairly adequate to establish the propriety or impropriety, from the standpoint of justice and law, of *the step asked to be taken.*" (Emphasis ours.)

(B) THERE ARE NO PLEADINGS OR EVIDENCE JUSTIFYING A FINDING UNDER SECTION 15A.

STATEMENT.

The facts, authorities, and arguments ante 55, apply to this proposition.

In *Baltimore & Ohio R. Co. v. United States, ad. pam.*, 277 U. S. 281, 301, decided May 21, 1928, this Court dealing with a similar principle said:

"There was no evidence to show the amount of revenue required to pay operating expenses, taxes and a fair return on the property of appellee lines or that their rates were not adjusted or were not sufficient to cover the transfer charges in question. There was nothing to support a finding that it is or will be unjust or unreasonable for the appellee lines to bear the cost of transfer of the westbound through traffic. The order cannot be sustained. *Florida East Coast R. Co. v. United States*, 234 U. S. 167; *Louisville & N. R. Co. v. United States*, 238 U. S. 1."

(C) DIFFERENCE IN RATES FOR JOINT AND SINGLE-LINE HAULS NOT OBJECTED TO CANNOT WITHOUT TESTIMONY BE DESTROYED.

STATEMENT.

The interstate rates in effect when the complaint was filed and the investigation ordered was a system of rates differentiating in charges between joint and single-lines. The

intrastate rates prescribed such differentials. All parties acquiesced in this system of making rates. There is a difference in cost between hauls over joint-lines and hauls over a single line.

ARGUMENT AND AUTHORITIES.

One of the special conditions in this case is that both the carriers and the shippers urged as to the interstate rates that there be a higher rate when the movement was over two or more lines than when the movement was over one line. Not only were these the contentions of the respective parties, but there was no testimony whatsoever relating to a one set of rates applicable both over single lines and two or more lines, what Mr. Price, of the Georgia Commission, said in argument after hearing relied on by appellees, is not evidence.

The Commission finds that all parties acquiesced in a joint-line scale and that finding is conclusive, being supported by testimony with nothing testified, as we believe, to the contrary. If, as defendants contend, there was some testimony favoring a single-line scale, such fact would not override the finding of the Commission. The Commission prescribed a single set of rates applicable to interstate transportation and sought by its orders of October 3, and of December 22, 1927, to impose this character of rates intrastate in Alabama (R. 24, 225). We are not here attacking the interstate rates when applied interstate. When, however, those rates are sought to be imposed intrastate, we say that there is inadequate proof to justify such interstate rates as a measure of intrastate rates.

In Investigation of Alleged Unreasonable Rates on Meats, 23 I. C. C. 656, 661, the Commission said:

> "That addition for a two-line haul is somewhat akin to that for a terminal service. A mileage scale ordinarily yields a much higher rate in proportion for a short haul

than for a long one; and when, therefore, two short hauls are combined, it is usually unjust to require the two carriers to accept compensation at the rate per mile applied for the entire long haul. To a degree they are entitled to a higher rate, in consideration of the fact that their individual hauls are short. Now, as distance increases the force of this consideration decreases. When distances of over 500 miles are involved, the fact that the service is by two lines is largely negligible."

Following this case and quoting the above language in *Hayden Bros. v. Railway*, 39 I. C. C. 94, 106, the Commission said:

"What was there said of a two-line haul will equally apply to a three-line haul."

Northwestern Cooperage & Lumber Co. v. M. & St. P. etc. Ry. Co., 43 I. C. C. 629, 632, held:

"Other things being equal, the rate for a two-line haul may properly be higher than the rate for a one-line haul, and the rates involved do not appear to exceed the rate sought by more than a reasonable switching charge."

The rule has in this territory been applied to fertilizer rates. In *Meridian Fertilizer Factory v. A. & S. Ry. Co.*, 33 I. C. C. 160, 163, the Commission said:

"The Commission has on various occasions recognized that it is just and reasonable for two or more independent lines, not part of the same system, but making up a through route, to charge a somewhat higher rate for a two-line haul than would be deemed reasonable for a single-line haul of equal distance. In *Corporation Commission of Oklahoma v. A. & S. Ry. Co.*, 26 I. C. C. 520, we established a schedule of class rates to apply between points in Oklahoma and points in Texas and in that case fixed certain arbitraries by which the rate for the two-line haul might exceed the one-line haul. On Class E, which in the absence of commodity rates applied on fer-

tilizer, we allowed a 2-cent higher rate for a haul over two lines. The same principle has been applied in other cases, and we see no reason why it should not be applied in the instant case.

"Upon consideration of all the facts of record we are of the opinion and find that the present single-line rates on acid phosphate from Shreveport to the destinations involved are not shown to be unreasonable . . .

"We find, however, that defendants' present rates for a haul over two or more lines are unreasonable, and subject to the same limitations as to the relative maximum rate, we find that rates for a haul over two or more lines should not exceed those for a haul of like distance over a single line by more than 2 cents per 100 pounds."

While there is no evidence in the case at bar that would furnish a basis for finding the extent by which a rate over two or more lines should exceed the rate over one line, there is certainly a higher cost and thus a justification for a higher rate over the joint lines-haul. The situation is similar to *Illinois Central R. Co. v. Railroad Commission of Kentucky*, 1 F. (2d) 806, *supra*, where it was said:

"All concede that the ton mile rate should be higher on a short haul (here joint-line haul), but how much higher there is no proof."

In *Memphis Freight Bureau v. Illinois Central R. Co.*, 27 I. C. C. 507, 517, referring to certain rate comparisons, the Commission said:

"It is to be noted, however, that the rates cited are for hauls over one line only. Under these state scales the rate for a haul over two lines is the sum of the rates for each line separately minus 10 per cent."

In prescribing rates in this case, p. 518, the rates were higher "for a haul over two or more lines."

Evidence and authority and the acquiescence of all parties, all show a difference in cost when two or more roads are involved over that when only one performs the transportation service. The evidence, admissions, and these authorities the Commission ignored, seemingly assuming the right without evidence or pleading, and contrary thereto, to balance charges and strike a medium. Generally the Alabama intrastate rates are for short hauls over one line and, therefore, should be lower than interstate rates over two or more lines. How much lower "there is no proof."

IV. THE ORDERS SOUGHT TO BE SET ASIDE ARE ARBITRARY AND UNJUST.

(A) THE CARRIERS HAVE DISCRETION TO CHARGE LESS THAN THE INTERSTATE RATES WHILE THE INTRASTATE RATES ARE MINIMUM RATES.

STATEMENT OF FACTS.

By the order of October 3, 1927 (R. 25), the Commission directed that intrastate rates in Alabama should "be not less, for corresponding distances than the rates contemporaneously applied by said carriers in *accordance* with our order (fixing interstate rates) of July 19, 1926." The order of July 19, 1926, required the carriers to make rates not in excess of those prescribed (R. 118). This order of July 19, 1926 (113 I. C. C. 427, 428, R. 86, 87, 88), authorized certain group rates (R. 87) and excepted from the interstate rates certain rates in the Mississippi Valley and from the Ohio and Mississippi Rivers. These groups nor these exceptions can be applied in Alabama which is not in the Mississippi Valley, nor does it touch either of said rivers. So the rates intrastate are "in accordance with" the order of July 19, 1926, fixed on the scale without exception and can not be less. If the carriers follow the authority of that order they may make by

groups and otherwise lower rates per mile interstate than intrastate yet the intrastate rates can not be changed accordingly either by the Alabama Public Service Commission or the carriers in the State of Alabama.

ARGUMENT.

It can and probably will be argued that while the intrastate rates are fixed and discretion left with the carriers as to interstate rates, that when the carriers exercise their discretion applications may be made to the Commission for a modification of its orders relating to intrastate rates. The answer to such argument is that this action is directed to an order that unfairly prejudices intrastate shippers and that if the Interstate Commerce Commission has authority to change its order it has not done so and to concede to it such authority is to deprive the state agency of all power over intrastate transportation.

(B) IMPORT RATES LEFT ON A GROUP BASIS DEPRIVE INTRASTATE SHIPPERS IN ALABAMA OF THE ADVANTAGES OF THEIR LOCATION NEARER THE PORT OF MOBILE.

STATEMENT.

Import rates from New Orleans interstate are grouped with such rates from Mobile disregarding largely the differences in mileage (113 I. C. C. 428, R. 88). Many fertilizer materials are imported. The interstate shipper gets import rates from the further distant ports as low in some instances as the state shipper gets for the shorter haul from his home port (R. 283, 284, 317, 387, 425, 453, 498, 618, 622, 650, 667, 706, 736, 795, 903).

ARGUMENT.

This and the similar discussion IV-A above show why in fairness as well, we believe, as under the law, the Interstate Commerce Commission should confine itself to the regulation of such interstate rates only as from all the surrounding facts and circumstances give the intrastate shipper an undue advantage over the interstate shipper. By attempting, as was done here, to regulate intrastate rates in mass the Commission has possibly removed advantages enjoyed by some shippers intrastate but has certainly unduly burdened other intrastate shippers.

(C) *SHORT LINES* IN ALABAMA DO NOT GENERALLY IF AT ALL, COMPETE WITH INTERSTATE CARRIERS BUT DO HAVE TRUCK COMPETITION WHICH DOES NOT AFFECT INTERSTATE CARRIERS.

STATEMENT.

The short lines as a whole earn less than reasonable revenues but there is no evidence as to the earning of particular short lines in Alabama (R. 588) except one which earned 10% (R. 590). These short lines did not join in the original complaint of July 30, 1924, although the complainants prayed "on their own behalf and on behalf of all carriers operating in the State of Alabama." Later the short line roads did ask that the order of July 19, 1926, be extended to them and without further hearing that was done by the Commission necessitating an amendment to the bill of complaint herein (R. 219 *seq.*). There is truck competition for short hauls in Alabama (R. 672, 819, 826).

ARGUMENT AND AUTHORITIES.

Short lines having truck competition are situated differently from interstate lines with hauls long enough to make

trucking impracticable. This differentiates the two classes of transportation. *Caddo etc. Oil Corp. v. Kansas C. & R. Co.*, 98 I. C. C. 39, 42.

V. THE RECORD DISCLOSES THAT PARTS OF THE ORDERS COMPLAINED OF ARE WITHOUT SUPPORT IN LAW OR FACT AND THIS MAKES THE ORDERS COMPLAINED OF ARBITRARY AND UNJUST.

STATEMENT.

This record shows that the Commission consolidated cases involving interstate rates throughout southern territory with cases involving intrastate rates in South Carolina, Georgia, and Alabama, and that the Alabama case was given only incidental consideration. That some intrastate rates in Alabama do not compete with and cannot burden interstate shippers or interstate commerce. That the rates interstate in effect when the complaint was filed, which rates it was pleaded bore an unfair relationship to the intrastate rates, were changed and new interstate rates substituted as to the relationship of which new rates to the intrastate rates there was no pleading and there has been no hearing. These new interstate rates were on a different carload minimum and a different basis as to joint and single-line hauls from the interstate rates in force when the complaint was filed and heard. That the rates intrastate were on the same basis so far as joint and single-line as the interstate rates set up in the complaint and that while this basis was "acquiesced" in by shippers and carriers alike the basis was changed without any testimony in the new rates established by the Commission. That exceptions to the rates fixed were prescribed on interstate rates which could not be applied intrastate. That intrastate shippers are deprived of the advantages of short hauls on import traffic while placed on the same mileage scale as

the interstate rates on domestic traffic. That competition with trucks exists on some intrastate traffic which does not apply to interstate traffic. That state rates are minimum while interstate rates are maximum rates. That some intrastate rates fixed as a result of the order of the Interstate Commerce Commission in the Meridian Case were higher than the rates interstate. That the carriers were shown without dispute to be earning more than the standard rate of return, to-wit, 5.88 per cent.

ARGUMENT AND AUTHORITIES.

The right of states to regulate their local rates can be denied only when such right is so exercised as in effect to be a substantial regulation of interstate commerce. Speaking of the commerce clause, in *Gibbons v. Ogden, supra*, it was said:

> "It is not intended to say that these words comprehend that commerce which is completely internal, which is carried on between man and man in a state, or between different parts of the same state, and which does not extend to or affect other states. Such a power would be inconvenient, and is certainly unnecessary."

Here, as in *Chicago, M. & St. P. R. Co. v. State Public Utilities Com. of Ill.*, 242 U. S. 333, there is some relation "between the state and interstate service, but the evidence does not bring it within that certainty and precision of influence that induced the decision in *Houston, E. & W. T. R. Co. v. United States*, 234 U. S. 342."

In the Wisconsin Case, 257 U. S. 563, 580, this Court quoted:

> "It is obvious that an order of a subordinate agency, such as the Commission, should not be given a precedence over a state rate statute, otherwise valid, unless, and except so far as, it conforms to a *high standard of certainty*."

In *Arkansas Railway Company v. Chicago, R. I. & R. Co.*, 274 U. S. 597, this Court resolved the doubts "in favor of the state power." The hearing was inadequate and in the orders of the Commission we submit that there has been manifest unfairness.

It is respectfully submitted that the orders of the Interstate Commerce Commission here involved should be enjoined and annulled as prayed.

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